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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN NORWOOD, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B208204 (Los Angeles County Super. Ct. No. BC356737)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane Johnson, Judge. Affirmed.

The Cochran Firm and Brian T. Dunn for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Gerald M. Sato, Deputy City Attorney, for Defendants and Respondents.

Appellant Kevin Norwood sued the City of Los Angeles ("City"), Tad Miller ("Miller"), and John Paxton ("Paxton") (all three parties collectively referred to as "Respondents") for violations of the California Fair Employment and Housing Act ("FEHA") after Appellant was terminated from his position as a firefighter recruit. The trial court granted Respondents' motion for summary judgment and entered judgment in favor of Respondents. Appellant appeals the trial court's order granting summary judgment as to his first cause of action. Appellant also challenges the trial court's refusal to allow the deposition of Laura Chick, the former Controller for the City. We affirm.

BACKGROUND

In June 2004, Appellant was hired by the City as a firefighter recruit; he entered the Frank Hotchkin Memorial Training Academy ("FHMTA" or "Academy"), along with 51 other recruits. Appellant was terminated from the Academy in October 2004 for "failure to meet the minimum standards of the Los Angeles Fire Department for the position of Firefighter I." In July 2005, Appellant filed a complaint of discrimination with the California Department of Fair Employment and Housing, alleging that he was fired and harassed because of his race or color. The case was closed "because an immediate right-to-sue notice was requested."

In August 2006, Appellant sued Respondents for violations of FEHA, alleging three causes of action. Appellant's first cause of action was for discrimination on the basis of race; the second cause of action was for harassment on the basis of race; the third cause of action was for failure to investigate and take remedial action.

Respondents filed a motion for summary judgment. Respondents set forth the details of the tests that Appellant had not successfully completed at the Academy and argued that those provided the basis for his termination. Respondents thus contended that Appellant had failed to establish a prima facie case of race discrimination because there was no evidence of a causal connection between his race and his termination.

Respondents further argued that Appellant had presented no evidence of harassment, and that his third cause of action must fail because Appellant had failed to establish discrimination or harassment. Respondents also argued that Appellant had failed to exhaust his administrative remedies as to his third cause of action because it was not alleged in his complaint to the Department of Fair Employment and Housing. Finally, Respondents contended that the claims against the individual defendants must fail because there was no evidence of their involvement in Appellant's termination.

Respondents also filed a motion to quash a subpoena or, in the alternative, a protective order barring the deposition of Laura Chick, who had conducted a review of the management of the Los Angeles Fire Department in January 2006 (referred to by Appellant as the "Audit"). The following day, Appellant filed a motion to compel Chick to testify at a deposition. After the parties filed numerous cross-motions and memoranda on the issue, the trial court ruled that Appellant had failed to meet his burden of showing a compelling or extraordinary reason for deposing Chick. The court therefore granted Respondents' motion to quash and denied Appellant's motion to compel.

The trial court then granted Respondents' motion for summary judgment and entered judgment in their favor. The trial court applied the burden-shifting test established by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) and found that, as to Appellant's first cause of action, Appellant had failed to meet his initial burden of establishing that he was performing competently in his position prior to his termination. The court further found that, even if Appellant had established a prima facie case, he had failed to show that Respondents' stated reason for his termination was pretextual. The court accordingly granted summary adjudication of the first cause of action, for discrimination in violation of FEHA.

As to Appellant's second cause of action, for harassment in violation of FEHA, the trial court found that Appellant's complaint failed "to include any specific examples of harassment" and therefore granted summary adjudication. Finally, as to Appellant's third cause of action, for failure to take remedial action, the court granted summary

adjudication because "The Court cannot find that a defendant is liable for failure to take remedial action when the Court finds that there is no discrimination or harassment as a matter of law." Appellant challenges the trial court's grant of summary judgment on his first cause of action and the court's refusal to allow the deposition of Chick.

DISCUSSION

I. Deposition of Laura Chick

"The general rule in California . . . is that agency heads and other top governmental executives are not subject to deposition absent compelling reasons. [Citations.] . . . [¶] . . . An exception to the rule exists only when the official has direct personal factual information pertaining to material issues in the action and the deposing party shows the information to be gained from the deposition is not available through any other source. [Citations.]" (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910-911.) The burden is on the party who seeks to depose the official to "show[] good cause that the official has unique or superior personal knowledge of discoverable information." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289.) "[A] trial court's discovery ruling is not to be disturbed unless the court has abused its discretion." (*Id.* at pp. 1286-1287.)

In January 2006, Chick wrote a letter, in her capacity as Controller, to Mayor Villaraigosa, City Attorney Delgadillo, and the members of the Los Angeles City Council. She stated that she had conducted an audit of the Los Angeles Fire Department because "disturbing information regarding discrimination and harassment in the Fire Department came to light through whistleblower information and reports in the press." The Audit, which she transmitted with the letter, found a "prevalent perception of a hostile workplace which has resulted in employees not reporting incidents of harassment and hazing due to fear of retaliation." She concluded the letter by stating, "We have a duty to provide a work environment free of harassment, free of prejudice and free of

spiteful retaliation. The Department must give equal protection to all its employees regardless of race, gender or sexual orientation."

The Audit was conducted by Sjoberg Evashenk Consulting, Inc., and a copy was sent the same day to Fire Chief William Bamattre. The City filed a motion to quash the subpoena or seeking a protective order to bar Appellant from deposing Chick. The motion included a declaration of Chick, stating that she had no personal knowledge of Appellant's circumstances or his experience with the Fire Department and was not involved in any employment decisions regarding Appellant.

The trial court held that Appellant had not met his burden of showing a compelling or extraordinary necessity to conduct Chick's deposition. The court described the Audit as "unscientific and inconclusive," citing the Audit's focus on "management structure, leadership and accountability, compliance with established policies and procedures, communication and interrelations among its sworn staff, and comparability with other large fire departments." The Audit did address issues of discrimination and harassment of women and minorities, as well as actions taken to address such issues, but only in a general fashion. The Audit also addressed the percentages of women and minorities who successfully completed the fire department's training programs, focusing on the Drill Tower Recruit Training Academy location. Nothing in the Audit, however, indicates that Chick would have "direct personal factual information pertaining to material issues" in Appellant's action. (*Westly v. Superior Court*, *supra*, 125 Cal.App.4th at p. 911.) The Audit was conducted by an outside consulting firm, and the statistics and findings contained in the Audit do not pertain to the reasons for Appellant's termination from the Academy. In addition, the record indicates that the trial court repeatedly suggested that Appellant would be better served by deposing members of the consulting firm that actually conducted the Audit and were more likely than Chick to have direct personal factual information. Nonetheless, Appellant delayed setting the deposition of the consulting firm until after several hearings on the issue were held. Appellant accordingly failed to meet his burden of showing compelling reasons to depose Chick.

The trial court did not abuse its discretion in denying Appellant's motion to compel Chick's deposition.

II. Prima Facie Case of Discrimination

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) "Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party." (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal.App.4th 740, 754 (*Johnson*).) Here, the defendants are the moving party; thus, they have "the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. [Citations.] If a defendant's presentation in its moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that contrary to the defendant's presentation, a triable issue of material fact actually exists as to those elements or the defense." (*Id.* at p. 753.)

"California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination," set forth in *McDonnell Douglas*. (*Guz*, *supra*, 24 Cal.4th at p. 354.) The test requires the plaintiff to establish a prima facie case of employment discrimination by providing evidence that (1) he was a member of a protected class; (2) he was qualified for or performing competently in the position; (3) he suffered an adverse employment action, such as termination; and (4) some circumstance indicates a discriminatory motive. (*Id.* at pp. 354-355.) The plaintiff's burden of establishing a prima facie case "is not onerous, but it does require the plaintiff to present evidence of actions taken by the employer from which the trier of

fact can infer, if the actions are not explained by the employer, that it is more likely than not that the employer took the actions based on a prohibited discriminatory criterion." (*Johnson*, *supra*, 173 Cal.App.4th at pp. 754-755.) If the plaintiff establishes his prima facie case, "a rebuttable presumption of discrimination arises and the burden shifts to the employer to rebut the presumption with evidence that its action was taken for a legitimate, nondiscriminatory reason." (*Id.* at p. 755.)

Here, it is undisputed that Appellant is an African American. It also is undisputed that Appellant was terminated. Appellant accordingly has satisfied the first and third elements of his prima facie case. Only the second and fourth elements are at issue.

A. Second *McDonnell Douglas* Element

Appellant contends that the trial court erred in finding that he had failed to satisfy the second element of his prima facie case – that he was "performing competently in the position he held." (*Guz*, *supra*, 24 Cal.4th at p. 355.) In support of his contention, he cites the declaration of James Fernandez and the depositions of Shawn Sternick, Scott Campos, and Emile Mack.

Fernandez, a Peer Group Instructor at FHMTA who trained Appellant and other recruits daily, stated in a declaration that Appellant was a good recruit who was just as qualified as others who were permitted to graduate from FHMTA.

Sternick was a fellow recruit in Appellant's class. Sternick stated that Appellant had complained to him that Miller did not grade him fairly and that he had seen Appellant and Miller have an argument. Sternick observed that Appellant was strong and very fast.

Campos testified that "the only thing that [Appellant] failed to meet in terms of minimum standard requirements . . . was that he failed Laying a Line With a 4-Way Valve on . . . each of the two attempts he was given." The minimum required time was 45 seconds; on Appellant's first attempt, he received a time of 57 seconds, and, on his second he received a time of 46 seconds. Campos also testified that Appellant passed EMT 1 and EMT D Certification and numerous other tests.

Mack was the Bureau Commander of the Bureau of Human Resources, later called the Bureau of Training and Risk Management. Mack testified that he knew that Appellant felt that he had been graded unfairly by Miller on a test. In October 2004, Mack wrote a memo to Fire Chief Bamattre, recommending that Appellant be terminated from the Academy "for his failure to pass overall hose lay evolutions with a minimum passing score of 57 percent." Mack explained that Appellant "demonstrates an inability to perform his hose lay evolutions without manipulative, sequence of operational [*sic*], and safety violation mistakes during the evolutions. . . . He was lost in several hose lay positions and failed the nozzle position in all four hose lays. He had both serious and major safety violations in three of the four ladders that he failed on the initial attempts. He had minor to severe safety violations on three of his four hose lays."

The record indicates the following evaluators for Appellant's four hose lay tests. There are three positions for each test; hence, each of the four tests has three evaluators. Hose Lay #1: Sharrar, Fluxa, and Fluxa; Hose Lay #2: Fluxa, Miller, and Miller; Hose Lay #3: Miller, Sharrar, and Fluxa; Hose Lay #4: Drummond, Sharrar, and Drummond.

Mack reported that he had interviewed Appellant, who expressed his feeling "that he could not understand his hose lay performance scores." Appellant "felt 'iffy' on hose lay one (64%) and two (74%), but felt good about three (27%) and four (64%). He felt that he was doing his best. He said that he was not sure of the grading because of the way he felt and how it did not match his scores." Mack further stated that Appellant "said that he received appropriate assistance from the staff," and that the staff was "very helpful, clear and concise, and they helped him understand when he asked them questions."

The record also contains an October 2004 memo by J. Scott Mottram, Assistant Bureau Commander, recommending that Appellant be terminated from the Academy. Mottram wrote that Appellant had failed "to achieve a minimum score of 70% through four evaluated hose lays." The recommendation included further details, stating that Appellant received scores of 64% on Hose Lay #1; 74% on Hose Lay #2; 27% on Hose

Lay #3; 64% on Hose Lay #4. Appellant accordingly received only one passing score, 74%, and his overall average score was 57%, compared with the class average of 84%. The recommendation concluded that Appellant had "demonstrated his inability to multi-task during each hose lay operation and ha[d] displayed difficulty performing at a satisfactory level," despite having "been offered continual supervised remedial instruction throughout the training program." Because Appellant had "shown an insufficient amount of [physical] strength that causes him to use improper techniques, which can present an extreme safety risk to himself and those around him," Mottram recommended that Appellant be terminated from the Academy.

The trial court discussed the Fernandez declaration in determining that Appellant failed to establish the second element. The court reasoned that the declaration contained "almost no admissible evidence" because Fernandez "does not establish that he had knowledge of the nature of [Appellant's] training or [his] performance on tests at the academy." The court further stated that Appellant both "fail[ed] to present sufficient facts" and failed to "tie these facts into any legal analysis whatsoever." The court thus concluded that Appellant failed to establish that he was performing competently.

The trial court did not discuss all the evidence that Appellant presented, focusing on the Fernandez declaration. Nonetheless, even taking into consideration all the evidence cited by Appellant, Appellant has not presented evidence sufficient to raise a triable issue of material fact with respect to the second element. Fernandez's statement that Appellant was just as qualified as other recruits, and Sternick's testimony that Appellant was strong and fast, are subjective, vague statements that do not address the issue of Appellant's failure to achieve passing scores. The record indicates that Appellant received an average score of 57%, compared with the class average of 84%, on the hose lay tests, and that that this failure to perform competently was the reason for Appellant's termination.

B. Fourth *McDonnell Douglas* Element

Appellant also contends that the trial court erred in finding that he had failed to satisfy the fourth *McDonnell Douglas* element, which requires him to provide "evidence that suggests the employer's motive for the adverse employment action was discriminatory." (*Johnson, supra,* 173 Cal.App.4th at p. 754.) Appellant contends that Respondents' discriminatory intent was evidenced by the Academy's failure to follow its policy of not allowing a captain who has failed a recruit to test that same recruit on subsequent tests. Specifically, Appellant points to the failing scores he received from Miller, a Caucasian, on several tests. Respondents reply that, although Miller may have tested Appellant on different tests, he did not retest Appellant on a test for which he had already given Appellant a failing score.

Campos testified in his deposition that, although there was no written policy, the practice at the academy was that, after a captain failed a recruit, they tried to have a different captain grade that recruit. Fernandez stated in his declaration that, "in order to avoid bias, training instructors who had previously failed recruits on tests were not to test those same recruits, on that same retest." James Hayden testified that, "If there was a situation where a recruit was directly failed on a particular evolution, then that particular instructor, unless I was present, would not grade the recruit for the consequent testing." Hayden clarified that this meant that the same instructor would not retest the recruit on the same test, but that, for logistical reasons, the staff would have to test a recruit on other tests. He subsequently stated that "There are no known policies that were in place that would address Captain Miller never testing Mr. Norwood after having failed him on one particular test."

Paxton testified that, when they were determining which recruits they were to test, "If I had a recruit that I had failed on a prior exam, I would identify that to the other captains and ask to pass that name to another individual." He explained that, although there was no written policy requiring this practice, they followed this practice in order to avoid developing "a pattern with a recruit."

The evidence indicates that there was an unwritten policy at FHMTA to try to avoid having a captain retest a recruit on the same test after giving him a failing score, but that the policy was not always followed for logistical reasons. Although Appellant argues that the failure to follow this policy is evidence of discriminatory intent, there is no evidence regarding whether the policy was followed in the case of other recruits. There is no evidence, for example, that the policy was followed for Caucasian recruits but not for African American recruits, or that Appellant was singled out for such treatment.

Appellant points out that Miller repeatedly failed Appellant on tests that he subsequently passed, generally the following day, when he was retested by different captains. The record does contain tests indicating that Miller gave Appellant failing scores for tests on which different testers gave Appellant passing scores. Even conceding that Miller evaluated Appellant more harshly than other captains evaluated him, Appellant has not presented evidence regarding Miller's treatment of the other recruits in his class. Appellant's evidence regarding an argument between him and Miller does not support an inference of a discriminatory motive. Even more problematic for Appellant's case is that the record indicates that other testers, besides Miller, gave Appellant failing scores. For example, the record indicates that Evaluators Fluxa, Takeshita, Drummond, and Sharrar also gave Appellant failing scores.

Appellant also contends that discriminatory intent is evidenced by the fact that other recruits who received Notices of Special Counseling were, nonetheless, allowed to graduate. The record contains approximately 25 Notices of Special Counseling or of Improvement Needed that were issued to Appellant, detailing specific tests that he had failed or areas in which he needed to improve. Although Appellant argues that other recruits received such notices and yet were allowed to graduate, he has not provided evidence of who received the notices, the number of such notices the other recruits received, and what transpired after they received their notices. For example, Sternick testified generally that he received an oral reprimand and a Notice of Special Counseling, but there is no indication of how often he was subjected to corrective actions. Similarly,

Mark Perine testified that it was fairly common for recruits to receive Notices of Improvement Needed, and that he had received "at least one," but was still allowed to graduate. Nicholas Kobe agreed in his deposition that "people received Notices of Improvement Needed and yet still graduated." These general statements do not indicate the races of the recruits who received such notices or the numbers of notices any other recruit received. Nor do they indicate that anyone received as many notices as Appellant and yet was allowed to graduate.

In considering a summary judgment motion, "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.) Nonetheless, the court must "determine what any evidence or inference *could show or imply to a reasonable trier of fact*." (*Ibid.*, original italics.) Here, Appellant's evidence does not allow the inference that other recruits were allowed to graduate despite receiving numerous Notices of Improvement Needed, and that this was because of a discriminatory motive. In order to survive summary judgment, "[i]t is not enough to produce just some evidence." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105; see also *Guz, supra*, 24 Cal.4th at p. 362 [explaining that the FEHA claim could not survive the employer's motion for summary judgment unless the evidence in the record raises "a triable issue, i.e., a permissible inference, that [the employer] acted for discriminatory purposes"].) As the trial court reasoned, Appellant's evidence fails to establish that the other recruits "had the same chronic, consistent failure to perform the required minimum standard noted in [Appellant's] authenticated testing records." Appellant has failed to establish that Respondents' "motive for the adverse employment action was discriminatory." (*Johnson, supra*, 173 Cal.App.4th at p. 754.)

We agree with the trial court that Appellant has failed to satisfy the fourth *McDonnell Douglas* element. Although Appellant's burden at this stage "is not onerous," he must "present evidence of actions taken by the employer from which the trier of fact can infer . . . that it is 'more likely than not'" that Respondents terminated Appellant

"based on a prohibited discriminatory criterion." (*Johnson, supra,* 173 Cal.App.4th at pp. 754-755.) The evidence does not allow such an inference. Appellant accordingly has failed to establish a prima facie case of employment discrimination.

For the foregoing reasons, the trial court's entry of judgment in favor of Respondents is affirmed.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.